In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-867

ROTEK, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A30) is not officially reported. The Board's decision and order (Pet. App. A1-A29) are reported at 194 NLRB No. 73.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1972. On October 10, 1972, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including December 15, 1972. The petition was filed on December 13, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

492-644—73——1

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner threatened to close the plant if its employees selected a union, that it interrogated employees concerning their union activity, and that it selected an employee for lay-off because of his union activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner (the "Company") manufactures bearings in Ravenna, Ohio, for use on heavy equipment and machinery. In June 1970, five employees, including Billy Fowler, met together, both at work and outside the plant, to discuss formation of a union (A. 20–21, 54, 62, 102).[1] Thereafter, at the plant, Fowler sought the views of his fellow employees and urged them to organize (A. 70, 88–89).

In late June, Foreman Kenneth Welling called a meeting in his office to discuss "gripes" with Fowler and five other assemblers and grinders (Pet. App. A5–A6; A. 62, 94, 103, 148). Fowler did most of the talking during the 30-minute session, stating that Company wages "hadn't come up any," that rates

[1] "A." refers to Vol. I of the Appendix printed for use in the court below. "A.II" refers to Vol. II of that Appendix. We are lodging a copy of each with the Clerk of this Court.

"were below par," and that, if wage increases could not be obtained within the shop, the employees would have to "get some outside help" (Pet. App. A5–A6; A. 62, 94–95, 103). Welling replied that "before they brought the Union in, [the Company] would close the * * * shop down and move to Irondale" (Pet. App. A6; A. 94–95, 103).[2] Later that day, the six employees conferred with Company President Weber; Fowler again took the lead in urging the Company to improve working conditions (Pet. App. A6; A. 63–66, 103–104, 144–145, 153–154, 191–192).

On July 1, Foreman James Lloyd called a meeting, which was attended by five of the six shipping employees (Pet. App. A7–A8; A. 45–46, 48–49). Lloyd stated that Plant Superintendent Mitchell had directed him "to meet with his guys in the department and find out what complaints or grievances they had, if any," that he "wanted to know how the Company could improve in either wages or anything else so that they wouldn't need to get a union in," and that he "was supposed to give the list" to Mitchell (Pet. App. A7–A9; A. 46, 49–50). Stating that "there is talk going around the shop about organizing the shop with a union," Lloyd asked whether the men present "were in favor of a union." Employee Suzelis replied that he would not favor unionization " '[a]s long as we are treated good' " (Pet. App. A7–A9; A. 46, 49–50).

Late in July, due to declining orders, the Company decided to reduce its work force by 25 per cent (Pet.

[2] The Company had begun preparation of an additional facility at Irondale, 62 miles away (Pet. App. A5, n. 7; A. 178–180).

App. A13–A14). Employees were chosen for layoff ostensibly on the basis of "ability, attitude, cooperation"; employees whose positions were abolished could be substituted for employees whose positions were retained according to those criteria (Pet. App. A14–A15; A. 155, 187–189). On August 12, 27 employees were laid off, including Billy Fowler (Pet. App. A11–A12).

Fowler had been hired on January 12, 1970, and had worked as an hourly paid assembler for six months (Pet. App. A19–A20; A. 61, 89). In early July, he was promoted to the job of production recorder, after the job had been posted for competitive bidding (Pet. App. A19–A20; A. 68–69, 82, 140; A. II, 11). In mid-July, Richard Hartline, the head of the scheduling operation, told Fowler that he "was doing a 'real good job' " as a production recorder, and that "it looked like" Fowler would "make out real well in * * * that position" (Pet. App. A20; A. 75, 86). At the same time that Fowler was laid off, the Company retained employee Bradfield, who had been hired to fill Fowler's old assembly job less than a month before (Pet. App. A15, A20–A21; A. 95, 105–106; A. II, 8). It also retained inspection employee Elder, who one month earlier had been passed over for promotion to production recorder in favor of Fowler (A. 221, 82).

B. THE DECISIONS BELOW

The Board found that the Company violated Section 8(a)(1) of the Act by threatening to close and move the plant if its employees organized, and by in-

terrogating employees about their union sympathies while asking what benefits the Company could grant to prevent their unionization (Pet. App. A6, A8–A9). The Board further found that, while the August 12 reduction in force was made for business reasons, the Company violated Section 8(a)(3) and (1) of the Act by selecting Billy Fowler for termination because he had openly led concerted activities and advocated unionization (Pet. App. A14–A15, A21–A22). The Board ordered the Company to reinstate Fowler with back pay, and to cease and desist from discriminatory practices against employees who engage in concerted activities or from any other practices interfering with employees in the exercise of their rights under Section 7 of the Act (Pet. App. A24–A25). The court of appeals sustained the Board's decision and enforced its order (Pet. App. A30).

ARGUMENT

Petitioner's contentions that Fowler's layoff was not due to his organizational activity, and that the remarks of Foremen Welling and Lloyd were either not attributable to the Company or non-coercive, raise only evidentiary issues which do not warrant review by this Court; the court below properly found that there was substantial evidence to support the Board's findings. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

Petitioner's assertion (Pet. 9–10) that Welling's threat to close the plant cannot be attributed to the Company is not supported by *National Labor Rela-*

tions Board v. *Mathieson Alkali Works*, 114 F. 2d 796, 802–803 (C.A. 4); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 479 (C.A. 5); and *National Labor Relations Board* v. *Hinde & Dauch Paper Co.*, 171 F. 2d 240, 241 (C.A. 4). Those cases involved isolated statements during casual conversations; Welling's threat was made during a formal Company meeting, at which he was exercising his conceded authority to deal with employee grievances.

The decision below is not in conflict with *Hackney & Sons* v. *National Labor Relations Board*, 426 F. 2d 943 (C.A. 4). The issue there was whether the company's determination to discharge employees was motivated by anti-union or economic considerations. The court held, as the Board did here, that the evidence did not support a conclusion that the motivation was anti-union. The Board in *Hackney* had not found any discrimination in the *selection* of employees for discharge, and that issue was not before the court. See 426 F. 2d at 945 (opinion of Bryan, J.) and 946–947 (opinion of Haynsworth, J.).

Nor is *Rivers Mfg. Co.* v. *National Labor Relations Board*, 376 F. 2d 511 (C.A. 6) (reproduced at Pet.

App. A31–A40) apposite. The court there found the evidence insufficient to support an inference that the company knew of the union's organizing efforts and of the discharged employees' participation in those efforts at the time of the discharges. Here, by contrast, the Company's supervisory personnel were aware of the concerted activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973